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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON AND TAKERU KAMIYAMA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

~~MOTION OF~~ THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

Amici respectfully move, for the reasons set forth in the Interest of Amici Curiae, for leave to file the within brief amici curiae. Petitioners have granted written consent to the filing of this brief. While Amici anticipate that respondent will consent, written consent has not yet been received by counsel.

BURT NEUBORNE
Counsel for Amici Curiae

February 22, 1984

QUESTION PRESENTED

Did the court below err in declining to permit petitioners to be tried before a judge instead of a jury in view of the petitioners' pervasive unpopularity and the District Judge's recognition that a bench trial would be "fairer"?

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SUMMARY OF ARGUMENT

When a pervasively unpopular defendant faces trial before a jury which he reasonably believes may harbor a degree of hostility toward him, three alternatives are possible. First, the government may forego criminal prosecution. Such an alternative is, of course, unpalatable in the extreme because it might permit a defendant to escape trial merely because his crimes are universally abhorred. Second, the court may empanel the fairest jury possible, recognizing that it may be impossible to assemble a wholly untainted jury. When a criminal defendant demands a jury trial, the constraints of practicability weigh heavily in favor of selecting the fairest jury possible rather than foregoing prosecution. Thus, a criminal defendant who

demands a jury trial may be forced to appear before a jury which harbors hostility toward him.

However, when a defendant is prepared to waive trial by jury in order to avoid the impact of pervasive commmunity hostility, no basis exists to force that defendant to be tried before a tainted jury. Thus, in the absence of a showing of compelling need for a jury determination, procedural due process of law requires that an unpopular defendant be permitted to opt for a bench trial in order to avoid the impact of widespread community hostility.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of fundamental liberties guaranteed by the Constitution. The New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union. The right of a pervasively unpopular defendant to a fair and impartial finder of fact in a criminal trial which turns on highly subjective considerations is at the core of procedural due process of law. Ordinarily, of course, the imperative of a fair and impartial fact-finder in a criminal case is satisfied by compliance

with the commands of the 6th Amendment. When, however, a defendant has reason to fear that his pervasive unpopularity may taint the deliberations of a jury selected in compliance with traditional 6th Amendment standards, amici believe that the Due Process Clause of the Fifth Amendment guarantees such a defendant the right to be tried before a judge, especially when the judge believes that a bench trial would be "fairer" to the highly controversial defendant.

This brief amici curiae is respectfully submitted in support of petitioners' application for a writ of certiorari in the hope that the Court will utilize this opportunity to clarify the circumstances under which a pervasively unpopular defendant enjoys a due process right not to be tried before a cross-section of the community which fears and despises him.

STATEMENT OF THE CASE

Reverend Sun Myung Moon may well be among the most unpopular figures in the United States.[1] As founder and leader of a small controversial religious denomination which seeks to appeal to the young; which engages in vigorous prosyletization; and which purports to exercise considerable control over the daily lives of its adherents, Rev. Moon has incurred the hostility of mainstream religious groups and has triggered an outpouring of fear from the general public, many of whom view him as the leader of a dangerous cult which preys on the young.

When the government charged Rev. Moon with knowingly filing false income tax

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1. This brief is submitted in support of Rev. Moon's petition for certiorari, as well as the petition of Takeru Kamiyama, one of his close aides. The relationship between Rev. Moon and Mr. Kamiyama is such that Mr. Kamiyama bears the same burden of hostility as Rev. Moon.

returns because he failed to report approximately $100,000 in interest on funds held openly in his name in an account at Chase Manhattan Bank,[2] it raised two critical factual questions:

(1) Was Rev. Moon holding the funds for his personal use or for the use of the church?

(2) Did Rev. Moon willfully fail to report the interest as taxable income, or was he acting pursuant to a good faith belief that, as church funds, the interest was not income to him?

In order to have answered those questions, a finder of fact must, of necessity, have passed upon Rev. Moon's credibility and integrity, as well as his role in -- and relationship to-- the Unification Church. Given the pervasively negative perception of

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2. The indictment also charges a failure to report the receipt of shares of stock in Tong II Enterprises as a taxable stock dividend. Since the issues surrounding the interest on the Chase Manhattan accounts and the Tong II stock are identical, discussion is confined to the Chase Manhattan interest in order to simplify the brief.

both Rev. Moon and the Unification Church in the community, and given the highly subjective nature of the necessary factual determinations, petitioners harbored understandable fears that even the most conscientious juror could not help but be influenced by a latent hostility toward Rev. Moon in making the delicate factual judgments made necessary by the government's indictment. Accordingly, each petitioner waived the 6th Amendment's guaranty of trial by jury and sought instead to be tried before a judge. The government, claiming that public confidence in the fairness of the proceedings could be assured only by the participation of a jury, declined to consent to a bench trial. The District Judge, despite his belief that a bench trial would be "fairer" and despite his skepticism concerning the government's ostensible reason for opposing a bench trial, deemed

himself bound by Singer v. United States, 380 U.S. 24 (1965), to deny petitioners' request for a bench trial in the absence of the government's consent.[3] With respect, however, Singer holds merely that a defendant is not entitled to a bench trial over the government's objection simply to serve his personal convenience. When, as here, a defendant seeks a bench trial, not to advance his personal convenience, but because he reasonably believes himself to be widely feared and disliked in the community, Singer fully supports a defendant's right to

3. The Second Circuit, in affirming, similarly viewed Singer as giving the government an absolute veto over a defendant's request for a bench trial unless a defendant could show that it was impossible to empanel a jury which met minimum 6th Amendment standards. Why a defendant who is able to show that it is impossible to empanel a jury to try him would voluntarily seek a trial before a judge, as opposed to demanding an outright dismissal, is a mystery that neither the District nor the Circuit Court chose to explore.

a bench trial, at least in the absence of a compelling showing of need for a trial by jury.

REASONS FOR GRANTING THE WRIT

This Court has lavished considerable attention on assuring that the criminal fact-finding process remains scrupulously fair. Whether it has been concerned with the size,[4] placement[5] and satisfaction[6] of the burdens of proof, the composition of the jury;[7] or the effect of prejudicial publicity,[8] this Court has been careful to assure an accused access to an impartial fact-finder capable of treating the

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4. Eg. In re Winship, 397 U.S. 358 (1970).
5. Compare, Mullaney v. Wilbur, 421 U.S. 684 (1975) with Patterson v. New York, 432 U.S. 197 (1977).
6. See generally, Leary v. United States, 395 U.S. 6 (1969) and Jackson v. Virginia, 443 U.S.307 (1979).
7. Eg. Castaneda v. Partida, 430 U.S. 482 (1977); Taylor v. Louisiana, 419 U.S. 522 (1975); Ballew v. Georgia, 435 U.S. 223 (1978).
8. Sheppard v. Maxwell, 384 U.S. 333 (1966).

defendant as innocent until proven guilty beyond a reasonable doubt. Ordinarily, careful voir dire coupled with conscientious jurors combine to produce juries which are both impartial and fully prepared to deflect error in accordance with the constitutional presumption of innocence. Occasionally, however, a defendant is so notorious that empanelling a wholly untainted jury is all but impossible.

One alternative to the use of such a partially tainted jury would be to forego the prosecution altogether. However, such an approach might well permit notorious criminals to escape prosecution merely because their crimes are universally abhorred.

A second and more practical response would be to empanel the fairest jury possible, recognizing that while some taint may exist, so long as a tolerably neutral

fact-finder can be assembled, the alternative of no trial at all is unacceptable. See Dobbert v. Florida, 432 U.S. 282 (1977); Murphy v. Florida, 421 U S 794 (1975); Irwin v. Doud, 366 U.S. 717 (1961). Thus, if Rev. Moon had demanded a jury trial, the constraints of practicability would have made it impossible for him to have demanded a wholly untainted jury.

A third alternative, however, should be available to a defendant who reasonably fears that even the fairest available jury is saturated with conscious or unconscious bias, making it virtually impossible for the presumption of innocence to operate properly. Instead of being forced to stand trial before a tainted jury, such a vulnerable defendant should be able to waive trial by jury and seek, instead, a bench trial. Singer v. United States, 380 U.S.

24, 37-38 (1965). When such an unpopular defendant reasonably fears that a jury trial is a tainted trial, no legitimate basis exists to deny him access to the fairest available fact-finder. Certainly, the justifications proferred by the government do not make out a case for denying an unpopular defendant's request to be tried before a judge.

The government argued below that its opposition to a bench trial was necessary to preserve the integrity of the institution of trial by jury. However, the recognition of a narrow class of widely unpopular defendants who may seek a bench trial in no way threatens the institution of the jury, which would remain the finder of fact in the vast bulk of criminal settings. Indeed, the government's objection appears to confuse means and ends. A jury is not an end in itself, but the means by which a fair and

impartial factual determination may be reached. When, because of the pervasive unpopularity of a defendant, genuine doubt exists about the fairness of using a cross-section of the community as a fact-finder, it would be self-defeating to argue that a jury must be used, even when a judge agrees with a defendant that a bench trial would be fairer.

The government's other justifications for blocking a bench trial are similarly unpersuasive. Solicitude for the trial judge's reputation cannot possibly justify the government's refusal to accede to a bench trial, especially when the judge was perfectly willing to accept the responsibility.

Concern over public acceptance of the verdict is certainly a legitimate concern of a prosecutor, but it is difficult to see how the public's sense that justice was done can

be enhanced by forcing an overwhelmingly unpopular defendant to be tried before a jury in spite of his request to be tried before a willing judge.

Finally, opposing a bench trial because the defendant has claimed that the indictment was politically motivated is both irrational and violative of the First Amendment. If anything, the government's insistence on a jury when both the defendant and the judge believe that a bench trial would be fairer simply reinforces public suspicion that Rev. Moon was the target of religious persecution, to say nothing of inflicting a serious penalty on Rev. Moon for having dared to criticize the prosecutor.

CONCLUSION

For the above-stated reasons, amici urge that a writ of certiorari be granted herein or, in the alternative, that

petitioners' convictions be summarily reversed and remanded for a bench trial.

Respectfully submitted

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